28th Congress, 1st Session. Doc. No. 106. Ho. of Reps.

HUGH A. GARLAND.

MEMORIAL

OF

HUGH A. GARLAND,

TOUCHING

His conduct as Clerk of the House of Representatives in the 26th Congress of the United States.

JANUARY 22, 1844.

Read, and laid upon the table.

To the honorable the House of Representatives of the United States:

Your memorialist would respectfully state to your honorably body, that, while acting as Clerk of the 26th Congress, he asked leave to read a certain paper which, he said, had been drawn up in his defence, as will be seen from the following extract from the Journal:

"TUESDAY, *December* 3, 1839.

"Hugh A. Garland, Clerk to the late House of Representatives, made a brief verbal statement of the motives which induced to the course taken by him yesterday, in relation to calling the names of persons claiming to be members from the State of New Jersey. He also stated that he had reduced to writing his reasons for the course he had taken, and asked permission of the members to read it."

This permission was refused, and your memorialist was suffered to be condemned as having taken a bold and unprecedented course, without the reasons for his course being spread on the Journal in his vindication.

Now that the party excitement of the day has passed away, and all men disposed to do justice, your memorialist respectfully prays your honorable body to cause the accompanying document, which is the one alluded to above, to be filed among the archives of the House, or otherwise disposed of as you may think best.

Most respectfully,

HUGH A. GARLAND.

Congress having adopted no general law to ascertain the title of those who claim a seat in the House of Representatives, nor any rule to organize

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the House itself in the meaning of the constitution, the following investigation is undertaken, with a view of eliciting, from former precedents in past usage, those general principles of parliamentary law which should be received and acknowledged until modified by positive enactments.

The Commons House of Parliament in Great Britain, from time immemorial, has been organized after the strictest mode of legal processes. Whenever a Parliament was to be called, the King gave warrant to the Lord Chancellor to summon the Lords spiritual and temporal, and to issue writs of election for the several counties, cities, and boroughs, directed to the sheriffs of the same. By virtue of this authority, the sheriffs sent their precepts to the election officers, commanding them to hold elections in those places entitled to representation in Parliament. Returns of the elections in the form of indenture were sent to the sheriff, and by him attached to the original writ, and forwarded to the Crown office, whence they originated, and were filed.

From these, in one authentic book, the names of all the knights, citizens, and burgesses were certified to the clerk of the House of Commons on the day the writs were returnable, being the day for the meeting of Parliament. The lord steward of the King's household, in an ante-room, attended by the clerk of the Crown and clerk of the Commons, with the rolls of such names of the Commons as were returned, commanded the rolls to be called; and those who answered to their names received the oaths required by law. This ceremony completed, the members took their seats in the House, and waited a summons from the King to come into his presence. After hearing the King's speech, leave was then granted them to assemble in their usual place of meeting, and to make a choice of one from among themselves, to be their "MOUTH AND SPEAKER." The nomination was generally made by one of the King's officers, and agreed to without a division; if, however, others were named, the House proceeded to the question, and directed the clerk "sitting at the board (as the order is, before the Speaker is chosen) to make the question."

From this mode of procedure, two important conclusions are to be drawn: first, that the Commons were regularly organized and constituted a House, capable of propounding and deciding questions, before the election of a Speaker. When the roll had been called, and members had answered to their names, taken the oaths prescribed by law, and seated themselves in their *usual places of meeting*, there was then a House of Commons. The appointment of one to be the *mouthpiece* was important for their own convenience, but not necessary to constitute a House. There were *Parliaments before Speakers*, is an ancient and significant phrase. Indeed, we are told by historians, that, at first, there were no Speakers; but some person was selected as "spokesman" for each particular occasion; that then the same individual was nominated for the entire session, *qui avait les paroles pour les communes;* and not until the time of Richard II was he styled *parleur pour les communes*, or Speaker of the Commons. A memorable case occurred in the time of James II, in 1678, when the Commons were without a Speaker for an entire week, and at last prorogued without having made an election. They at first had selected Sir Francis Seymour, and presented him to the King for confirmation—supposing the ancient usage in that respect to be a mere ceremony; but the King, wishing to test the strength of his prerogative, refused to sanction the nomination. They then returned to their own House without any one at their head, Sir Francis not making his appearance. This occurrence was on Friday; and

until the next Thursday the House were engaged in long and warm discussions on various subjects, adjourning at the same time from day to day. Propositions were made to appoint a chairman, and rejected. Committees were appointed to hold conferences with the King; others with the House of Lords; others again to search the records for precedents to guide their proceedings; and, after a week thus spent in fruitless efforts, they were disbanded, without coming to a conclusion among themselves, or an agreement with the King. This case is to be found in Grey's Debates, vol. 6, page 404.

The old Colonial Assemblies, having the British Parliament as a model, were organized in the same way; and our State Legislatures also, varying only in a few unimportant particulars. Whenever, at the time appointed, members presented themselves at the seat of Government, assembled in their *usual place of meeting*, took the oaths prescribed by law, and ascertained a *quorum* to be present by the calling of a roll, there was then duly constituted a House, competent to entertain and decide all propositions touching the privilege of members, the claim to contested seats, and whatever else might appertain to their more complete organization. There are, doubtless, many gentlemen here present who remember cases similar to the one referred to in the British Parliament, where their own Legislatures were engaged for days in discussing and deciding questions before the election of Speaker; that office being regarded (as it undoubtedly is) a mere instrument—a labor-saving machine to themselves.

The *second* conclusion to be drawn from an observation of the mode of organizing Parliament, is the extreme liability to fraud, and the imposition of spurious members. None but those whose names are recorded on some return, filed in the Crown office, are permitted to take their seats. It is obvious, therefore, that two officers alone, or either one—the sheriff of the county who makes the return, and the clerk of the Crown who files it—have it in their power to make such returns as they please. Perceiving the great advantage he possessed, the King, at an early period, attempted to interfere and dictate who should be returned to the Commons. In 1603, Sir Francis Goodwyn was elected from the county of Berkshire: returns were made in due form, and sent to the Crown office; the King pronounced him ineligible, and ordered the Chancellor to issue a new writ; which was done. Sir John Fortesque, one of the King's Council, was elected, the returns filed, and his name placed on the rolls of Parliament.

The sturdy and free-hearted yeomanry of those old days promptly resisted this procedure, and, in process of time, succeeded in wresting from the King his assumed prerogative of interfering with the returns of members filed in his office of chancery. Driven from this stronghold, he resorted to the next, which proved to be the most vulnerable point. By means of secret agents and emissaries, he completely effected his object, in bribing and suborning the sheriffs and their assistants. The books of law, and the reports of parliamentary decisions, are absolutely filled with cases of defective and partial returns, double returns, and false returns, knowingly and fraudulently made by those who had taken an oath to act justly and impartially, but who could not resist the rewards or the threats of a monarch and his nobility. So thoroughly corrupt had Parliament become, in consequence of the frauds practised on the return of its members, that a rule was adopted, in process of time, by which those returns were very little regarded. Perceiving that a rigid adherence to legal processes and technicalities had not only broken down the character and integrity of the

Commons, but was fast becoming the means of undermining the liberties of the people, they soon learned to draw a just and obvious distinction between a civil and political process—holding that a strict interpretation of the one, might screen the community from the grinding exaction of creditors; while a strict adherence to the other, was the only means of corrupting public officers, and of practising a fraud on the rights of the people.

So early as 1707, an order was adopted by the Commons, "That all petitions, at any new Parliament, relating to elections and returns, be delivered to the clerk of the House, and be laid by him on the table before the Speaker is chosen." And it was subsequently ordered that those cases should be considered before proceeding to any other business. In the mean time, those claiming the disputed seats were not allowed to participate in the proceedings—indeed, were prohibited by severe penalties.

Thus we see that, even in England, where the rights of the people are not regarded of paramount importance, the House of Commons, in self-defence, to protect itself from corruption and the intrusion of spurious members, was compelled to disregard the technicalities of law; to look beyond the mere formalities of a return, which was no longer *prima facie* evidence of membership, but an instrument of fraud; to pass by all those intermediate stages, so readily and constantly perverted, and look at the actual state of the case—the elections as they really took place among those who had "the right of election."

In some of the States of this Union a similar course is pursued, though their laws, if strictly interpreted and rigidly adhered to, would place it in the power of the Executive to organize a Legislature, in the first instance, after its own will; and thereby contravene the wishes of the people, and perpetuate the power in its own hands.

In Virginia, for example, a strict interpretation of the law would place the organization of the Legislature, in the first instance, in the hands of the Executive Council. But they have never interpreted the law as conferring any other power on them than merely to administer the prescribed oaths. They never examined the certificates of members, or took cognizance of their title in any way.

A high executive officer in Pennsylvania, (the Secretary of the commonwealth,) acting under laws not more rigid than those of England, or the State above alluded to, but feeling it his duty to follow the minutest technicality in regard to returns, rejecting all those of a conflicting nature, and presenting to the Legislature those only he deemed official, was wellnigh involving that ancient and patriotic Commonwealth in revolution and civil war.

Had the Secretary of State presented both returns from the county of Philadelphia, and explained the circumstances so far as they had come to his knowledge, he would have relieved himself from a very delicate position, thrown the responsibility of deciding the case where it properly belonged, (on the House of Representatives and the Senate,) and, in all probability, would have prevented those distressing scenes which followed the course he actually pursued. And much of the testimony given before a committee of the Legislature appointed to examine into the causes of the difficulties at Harrisburg, and many other recent events, all prove that, had he pursued the course above indicated, no difficulties would have arisen, and general satisfaction would have been given to the wise and candid of all parties.

Congress, however, both in regard to the return of its members, and its mode of organization, is governed by no statute, or prescribed rule of any kind. Originating as it did under circumstances altogether different from those of the Commons House of Parliament, it must necessarily, for its own guidance, have given birth to a set of principles entirely at variance from those of a legislature which sprung, in the first instance, from the will of a monarch, and was only enabled, after many generations of contest between their own privileges and the prerogatives of the Crown, to establish something like the independence and stability of a representative body.

Congress, as it is well known, took its origin in the conventions or assemblies of deputies sent by the colonies to consult for their defence and mutual welfare in a time of common danger. The first that met in Philadelphia, in 1774, was composed of men possessing every variety of credentials. Some were deputed by the colonial legislatures, others by popular assemblies, and others again by mere committees of safety.

Assembling, however, at the imminent hazard of their fortunes and their lives, the simple presence of any man was a sufficient guaranty of his honesty and zeal. Coming together for the first time, personally as strangers to each other, but well known as the bold defenders of a common cause, they forthwith (making no question of each other's authority) proceeded to elect a president to preside over their deliberations, and a secretary to record their proceedings. After they had formed themselves into a deliberative body, they then caused the credentials of those present to be read and approved. The Congress which assembled in May, 1775, was organized in the same way, not calling for the credentials of members until the House had been formed. After the articles of confederation had been adopted, the mode of organizing Congress was varied. The credentials were first produced and passed upon, before they proceeded to the election of officers. In the second Congress which met under the articles of confederation, the delegates produced their credentials in the first instance, which were read and referred to a committee, "to report thereon as soon as may be." The committee reported the next day; and all being approved, they then proceeded to the election of president and secretary. This preliminary examination by a committee was never practised before or after the Congress which met in 1784. In 1785 they handed in their credentials, which were read without being referred, and then proceeded to their elections. At the next Congress, in 1786, the credentials were referred to a committee, after the election of officers, but were not reported on until a late period.

The Journals, after the first Congress which met under our present constitution, run in these words: "The following members of the House of Representatives appeared, *produced their credentials*, and took their seats." And such, for a time, was the tenor of every Journal. Thus, it appears, that from the first time we had any organized system for the government of the States, some kind of credential, or evidence of membership, was expected and required before any one could participate in the deliberations of Congress; but the nature of those credentials, and the mode of determining their validity, have always been various, and to this day are not directed by any general law. The constitution has conferred on Congress the power of adopting a system of general regulations in regard to the elections and the returns. But this provision justly excited the jealousy of those who were friendly to the independence of the States; it was warmly resisted by many of the State conventions assembled to adopt the constitution; and the

point was only yielded on the promise that the constitution should be amended, in that particular, so soon as it had been adopted. Accordingly, at a very early period in the first Congress, Mr. Burke, of South Carolina, moved the following amendment: "Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections of Senators or Representatives, except when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such elections." It was urged in favor of this amendment, that the clause of the constitution conferring on Congress the power to regulate elections was obnoxious to almost every State; that it put it in the power of that body to establish a government of an arbitrary kind. If the United States are desirous of controlling the people, they can do it by virtue of the powers given them in the fourth section of the first article; and whenever they choose to exercise those powers, then farewell to the rights of the people, even to elect their own representatives. When did a confederated government have the power of determining on the mode of their own election? In the order of things, that power should rest with the States respectively, because they can vary their regulations to accommodate the people in a more convenient manner than can be done in any general law whatever. Such were the arguments advanced in defence of the amendment, but it was lost by a majority of five votes. So obnoxious, however, is any general law of elections, that, though many arguments of convenience and expediency might be urged in its favor, none has ever been adopted. Repeated attempts have been made, but always signally failed; and we may venture to say that none ever will be adopted, so long as the great and important doctrine of State rights is regarded.

In the mean time, the mode of procedure in regard to the organization of the House, and the admission of members, seems to have varied at different times, and never to have been controlled by any general parliamentary principle. Of late years, those evidences of membership called "credentials" are forwarded by very few of the States, and are rarely ever presented by members; so that the phrase found in the older Journals, "presented their credentials," has not been inserted for the last twenty years, because it expressed an untruth—none ever being presented. It has now become a matter of vital importance to elicit from past experience and former precedents some general principle governing all cases, and admitted as a sufficient rule, by which the title of membership, in the first instance, shall be determined, and [the House] be provisionally organized; and for this purpose, bearing in mind that this provisional organization is a mere incipient stage towards a more perfect legislative body, and always subject to the control of a majority, there can be no better rule than that which has been invariably practised by Congress. The rolls of the House of Representatives have always been made up of those names who, from common notoriety, and the general consent of all parties, were acknowledged to be members of Congress. Common fame and newspaper report may appear to be a slender reliance for so important a matter, but, when further examined, will prove of the highest and most trustworthy authority.

The press has become a fourth estate in the Government of civilized society. All matters appertaining to elections, returns, and public characters, are by it thoroughly sifted and made known to the whole country. Our country, too, ever has been, and ever will be, divided into two contending parties, and a wakeful jealousy will ever keep them observant of each

other's conduct; so that, by means of these opposing elements, with the aid of the press, the truth, and the whole truth, in regard to any political matter, may be as well [known] to those who live in the remotest parts of the Union, as to those who were eye-witnesses of the transaction.

Our elections are not held in obscure boroughs, and by a few electors, as in England. Fifty thousand people are directly interested in the result of each election. An active and warm canvass commences between the contending parties for many days before the voting is commenced. The candidates in many States go from house to house—from village to village—discussing important questions, and setting forth their respective claims. In other States, the same publicity is given to their proceedings through the press. When the election comes on, hundreds, in open day, press to the polls to give their votes; the progress of the election is watched from the beginning by suspicious, vigilant, and anxious partisans of the respective candidates.

The result, when announced, is known through the entire district—spread on the wings of the wind through the State—and soon becomes the subject of speculation and of interest to the intelligent portion of fifteen millions of people. It is obvious, therefore, that by this process it is utterly impossible for any fraud or deception to be practised, without immediate detection. The precise state of the poll, the number of votes given, the exact majority, and all questions and disputes growing out of the elections, become the most prominent part of the history of the day; and no private papers, (as all credentials are,) however well authenticated, can enable the proper officer to make up a more complete and satisfactory roll of members than he can from the current history of the times. He is made as well satisfied as he can be of any human events—by common notoriety, and the consent of all parties—that certain men, or, more properly, (as the individual may be unknown,) *certain names* are elected as members of Congress; and the next most important point is to identify the name with the individual actually elected.

The mode pursued by Congress in this respect, also, is a plain and simple one. When the day appointed by the constitution and the laws for the meeting of Congress has arrived, and those who are members, or claim to be members, present themselves in *their usual place of meeting;* and when, at the appointed or usual hour, the officer to whom has been intrusted, by long and undisputed usage, the duty of making a roll of members, on the principles above indicated, presents himself, announces that he is about to call the names of those who are members of the House of Representatives; when he actually calls a name, and one rises from his seat, or audibly answers to that name, there can be no question in the mind of any one that he is the individual actually elected, and entitled to his seat.

Under color of a piece of paper, or parchment, which he can procure by fraud or bribery, and under protection of the secret ballot-box, one might have the hardihood to present himself, go through the forms of initiation, and aid in doing infinite mischief—in subverting the constitution itself—before he could be detected; and then, by aid of his own voice, might save himself from ejection and punishment. But here, no one can conceive the possibility of such a thing. It is not in the human heart to strain itself up to the practice of a fraud surrounded by such existing circumstances. Silence and secrecy are essential to the perpetration of crime. But here are assembled in open day the Representatives of six-and-twenty States, and a

vast concourse of people from all parts of the Union, anxiously watching the minutest procedure. Can it be possible that one would rise in such a presence, and answer to a name that is not his, and claim a seat to which he has no title? It is not in man to act so base a part. When, therefore, the roll has been called through, and a sufficient number have answered to their names to constitute a *quorum*, there is then a House of Representatives, as contemplated by the constitution; for it says *each House shall elect its own officers*. As there are Parliaments, so there must be a House of Representatives, before the election of Speaker. And there is no other way in which a House can be constituted, than the one just described. When that process has been completed, there is then a House of Representatives, competent to entertain and decide all questions touching the privilege of members, the claims to contested seats, and all matters appertaining to their more complete organization. They cannot enter on the ordinary business of legislation, as prescribed and limited by the constitution, because they have not taken the oath to support the constitution; which, by some inadvertence, is required to be administered, not by a judicial officer, but by the Speaker himself, after his election.

While thus engaged in the adjustment of preliminary questions, the House must be governed by the common law of Parliament, without which no deliberative body can exist. It is true they are not bound by the rules of a preceding Congress; but those rules, like statutes, do not create or destroy, but only limit and define a general principle; take away the limitations, and the principle exists in its original force.

When thus constituted and organized into a House of Representatives, it is then the duty of the proper officer to lay before them all contested cases, and the evidence in his possession, that they may proceed according to the constitution to decide on the elections, returns, and qualifications of those contesting. After the most laborious investigation into all the precedents, from the earliest time, both in our own country and in England, I have come to the conclusion that this is the only safe and proper course to be taken. It is, indeed, the course indicated by Congress as the proper one, in the famous Moore and Letcher case, when both gentlemen voluntarily retired in the first stage of the organization; and this act of theirs was afterwards approved and confirmed by a vote of the House.

Though long usage and necessity of the case have imposed on the Clerk of the House the duty of making a roll of members to be called at the opening of Congress, yet he has no authority whatever to interpose in doubtful cases, or throw any obstacle in the way of an immediate adjustment by the House. Where there are no difficulties, his course is plain; but, in all matters of doubt, he is bound to present the evidence in his possession, and throw the responsibility of deciding where it has been placed by the constitution—on the representatives of the people. No party can take exceptions, no individual can be aggrieved, by this course. It will be as much in the power of the House to act on them when called at the end of the roll, as if they had been called in the regular routine, according to past usage. And by the mode here proposed, one great advantage will be gained, in having a House organized and competent to entertain and decide all questions touching the privilege of members, before any contested case shall come before them for consideration.

Believing that Congress, originating in peculiar circumstances, and being a government of confederated States, must necessarily be controlled by

laws differing from those of the House of Commons, or the State Legislatures, exercising jurisdiction over a consolidated mass; believing that the present mode of testing and recognising members is more efficacious than any positive enactment can be made; that it is more open, impartial, and consistent with our federative system, and that it is less liable to be perverted, under color of law and strict technicalities, into an instrument of fraud; believing that when a roll made up of the names of those who, by common notoriety, and the general consent of all parties, are recognised as members of Congress, has been called through, and a sufficient number have answered to their names to constitute a quorum, then there is a House of Representatives, as understood by the constitution, controlled by the common law of Parliament, and competent to decide all questions touching the privilege of members; and believing that then, and not before, all contested cases, with the accompanying testimony, should be laid before them for consideration, I feel it a solemn duty incumbent on me to proceed in this mode to organize the House, so far as necessity and unbroken usage from time immemorial have thrown that task on the Clerk of a preceding Congress.

Respectfully,

HUGH A. GARLAND.